**NATIVE TITLE (SOUTH AUSTRALIA) (MISCELLANEOUS) BILL 1999**

**Legislative Council, 18 November 1999, pages 518-20**

Second reading

**The Hon. K.T. GRIFFIN (Attorney-General)** obtained leave and introduced a bill for an act to amend the Native Title (South Australia) Act 1994. Read a first time.

The Hon. K.T. GRIFFIN: I move: That this bill be now read a second time.

I seek leave to have the second reading explanation inserted in Hansard without my reading it. Leave granted.

Background

The Commonwealth Native Title Amendment Act 1998 came into operation on 30 September 1998. It substantially amended the Native Title Act 1993.

The State Government reviewed the legislative options available under the Commonwealth legislation for South Australia and, as a result of that review, introduced the Statutes Amendment (Native Title No. 2) Bill 1998 (‘the 1998 Bill’) into Parliament on 10 December 1998.

The 1998 Bill, which has now lapsed, proposed amendments to the State’s existing native title scheme, as contained in the: Native Title (South Australia) Act 1994 Environment, Resources and Development Court Act 1993 Mining Act 1971 Opal Mining Act 1995 The 1998 Bill proposed the insertion of a new ‘right to negotiate’ scheme in the Petroleum Act 1940 that mirrored the successful schemes that are already operating under the Mining Act and the Opal Mining Act. It proposed incidental amendments to the Aboriginal Land Trust Act 1966 and the Electricity Act 1996. Proposed amendments to the State’s Land Acquisition Act 1969 were prepared separately but were dealt with in conjunction with the 1998 Bill.

The Bill now being introduced contains only amendments to the first of the Acts mentioned above, namely, the Native Title (South Australia) Act. It represents the State’s legislative response to the amendments to the Native Title Act in so far as they relate to the section 207A (recognised State bodies) scheme.

A separate Bill (the Native Title (South Australia) (Validation and Confirmation) Bill 1999) is being introduced to amend the Native Title (South Australia) Act to include validation and confirmation provisions as contemplated by the Commonwealth Native Title Act.

The amendments proposed in the 1998 Bill to other State Acts and the proposed amendments to the State’s Land Acquisition Act are presently subject to continuing consultations with Commonwealth officials to ensure strict conformity with the provisions of the Native Title Act.

Amending legislation for those Acts will be introduced once substantial agreement with Commonwealth officials as to such conformity has been reached and there has been an opportunity for further consultation with Aboriginal and other interest groups.

Recognised State bodies

Section 207A (formerly section 251) of the Native Title Act allows the States to establish their own Courts or bodies to decide native title claims (subject to approval from the relevant Commonwealth Minister).

The section envisages that there be will be a nationally consistent approach to the recognition and protection of native title and therefore requires that the law of a State and procedures thereunder be broadly consistent with the provisions of the Native Title Act.

South Australia received a determination from the Commonwealth Minister in 1995 stating that the ERD Court and Supreme Court are both recognised State bodies for the purposes of section 251 (now 207A) of the Native Title Act.

As a result of the 1998 amendments to the Native Title Act, it is necessary to amend the existing State legislation constituting the Supreme Court and ERD Court as recognised bodies to ensure the consistency of State processes with those in the amended Native Title Act.

Under the provisions of the Native Title Act, the Commonwealth Minister may write to the Attorney-General at any stage, as the State Minister concerned, to indicate that he considers the State’s recognised bodies scheme to be non-compliant. It is therefore important to ensure that the scheme is rendered compliant.

State and Commonwealth officials have liaised closely (and will continue to liaise) in order to ensure that the proposed amendments are consistent with the amended Native Title Act provisions.

Procedural amendments

The legislation amends South Australia’s registration test under the Native Title (South Australia) Act. The proposed new State registration test applies from the date of the proclamation of the Commonwealth legislation (30 September 1998) to avoid potential inconsistency or forum shopping on the part of claimants. The Government indicated in a public statement last year that it intended to amend the Native Title (South Australia) Act in this way.

A new section 39A has been introduced in terms similar to the equivalent provisions in the Native Title Act to specify the content of orders for the payment of compensation.

Amendments to the definition sections

A number of definitions and amendments are made to sections 3 and 4 of the Native Title (South Australia) Act to reflect definitions in the Native Title Act and to clarify aspects of the operation of South Australia’s scheme. In addition, section 4(5) of the Native Title (South Australia) Act, which currently states that native title in land was extinguished by an act occurring before 31 October 1975 that was inconsistent with the continued existence, enjoyment or exercise of native title in the land, has been removed as it is no longer necessary in light of the confirmation of extinguishment provisions which is proposed to be inserted in a later part of the Native Title (South Australia) Act by the Native Title (South Australia) (Validation and Confirmation) Amendment Bill. The section only had a declaratory effect which is now covered by the Native Title Act.

Change to notification processes

Section 30 of the Native Title (South Australia) Act has been amended to differentiate between the processes that must be followed depending on whether the notice issued is initiating right to negotiate proceedings or simply part of a general notification/consultation process. Notices that do not initiate the right to negotiate process will have a more streamlined process to follow, consistent with the Native Title Act.

A new section 15A has been inserted in the Native Title (South Australia) Act, consistent with similar provisions in the Native Title Act, providing for notice to be given of applications involving native title questions (as distinct from notice of hearings or decisions provided pursuant to section 16 of the Act). Section 16 of the Native Title (South Australia) Act has been amended to require notice of court hearings or decisions to also be provided to the relevant local council. As a corollary, the relevant local council has been included as an ‘interested person’ for the purposes of section 23 of the Native Title (South Australia) Act pertaining to the hearing and determination of applications for native title declarations. These provisions are consistent with similar provisions in the Native Title Act. I commend the bill to the house.

Explanation of Clauses

*Clause 1: Short title*

Clause 2: Commencement These clauses are formal.

*Clause 3: Amendment of s. 3—*Interpretation of Acts and statutory instruments This clause amends the interpretation provision. Subsection (1) of section 3 of the Act contains definitions that apply across the Statute Book. The following alterations are made to those definitions: A new definition of Aboriginal group is included for two purposes—to describe the persons to be considered a group for the purposes of making a claim to native title (namely, those that hold or claim to hold the native title under a particular body of traditional laws and customs) and to make it clear that, if there is only one surviving member of the group, that person will constitute the group. What it means to affect native title is defined in terms comparable to section 227 of the NTA. Claimant applications and non-claimant applications are defined to simplify references to applications for native title declarations made by Aboriginal groups and those made by others. The new definition of native title declaration reflects the terminology used in the NTA. A technical amendment to suit Commonwealth terminology is made to the definition of native title question. A new definition of native title party is included, referring to the Aboriginal group registered as the claimant to or the holder of native title. The term is used in provisions requiring negotiation with appropriate native title parties. A new definition of native title register is included for ease of reference to the Commonwealth and State Registers. A new definition of registered is included to make it clear that persons identified or described in a native title register as holders of or claimants to native title will be taken to be registered as holders of or claimants to native title. A new definition of registered native title rights is included as a means of limiting, where necessary, a reference to native title to those rights described in the relevant entry in a native title register. Under the Commonwealth scheme it is only acts affecting registered rights in respect of which a claimant has a right to negotiate. Substitution of the definition of registered representatives of claimants is a consequential technical amendment. The definition of representative Aboriginal body is substituted (and subsection (2) struck out) to reflect sections 202(1) and 203AD of the NTA. The NTA now requires that it is the Minister’s action under that Act that will determine the representative bodies for South Australia.

Subsection (3) of section 3 of the Act contains definitions that apply only for the purposes of the Act. The substituted definition of mining tenement (and the definition of relevant Act) provides a more flexible approach to ensure that all tenements relating to the recovery of underground resources are covered. A new definition of right to exclusive possession of land is included to enable the NTA wording to be conveniently incorporated. The expression is used in proposed sections 18(3)(c) and 23(3)(c).

*Clause 4: Amendment of s. 4—Native title*

The amendments in this clause reflect the amendments to the concept of native title in s. 223 of the NTA.

*Clause 5: Substitution of heading to Part 3 Division*

The heading to the Division is altered to reflect the broadening of the Division to cover notice of applications involving native title questions as well as notice of hearings and proceedings.

*Clause 6: Amendment of s. 15—Registrar to be informed of applications etc involving native title questions*

Section 15 is amended to make sure that the Court informs the Registrar of amendments of applications involving native title questions.

*Clause 7: Insertion of s. 15A*

A new section is inserted to govern notification by the Registrar of relevant parties of applications for native title declarations, amended applications, applications for variation or revocation of native title declarations, applications for compensation payable for an act extinguishing or otherwise affecting native title and other applications of a prescribed kind. Compare section 66 of the NTA.

*Clause 8: Amendment of s. 16—Notice of hearing and determination of native title questions*

The amendments provide that a notice of hearing need not be given to a person who is not a party to the proceedings if the native title question arises on an application of which notice has been given under section 15A, extend the requirement for notification to councils, reflect the longer time limit contained in s. 66(10) of the NTA and enable the regulations to require public notice of a hearing of a native title question to be given.

*Clause 9: Insertion of s. 16A*

A new section is inserted to expressly provide that the Court may order that a person who appears to have a proper interest in proceedings involving a native title question be joined as a party at any time.

*Clause 10: Amendment of s. 17—Register*

The amendment to paragraph (c) reflects s. 186(1)(g) NTA. The register is required to contain a description of the rights claimed to be conferred by the native title. The removal of subsection (4)(b) means that the names and addresses of the claimants need not be included in the register and reflects the removal of s. 188(2) of the NTA. New subsection (5) requires the Registrar to keep the register up to date.

*Clause 11: Substitution of ss. 18, 19 and 20*

These sections are substituted in order to mirror the new registration test and the processes for registration of a native title claim contained in the NTA.

Proposed section 18 sets out the persons who may make an application for a native title declaration. This corresponds to the table in section 61 of the NTA. Various restrictions on the making of applications are set out, corresponding to section 61A of the NTA.

Proposed section 18A mirrors the requirements of ss. 61 and 62 of the NTA (and to a certain extent s. 190C(4) and (5)) about the content of an application for registration of a native title claim.

Proposed section 19 requires the Registrar to determine whether, in the case of a claimant application, the claim should be registered. A claimant may choose not to submit the claim for registration—for example, where it is clear that the registration tests are not met but the claimant requires the matter to be determined by the Court.

Proposed section 19A sets out the test to be applied to claims by the Registrar and corresponds to ss. 61A, 190B, 190C and 190D of the NTA.

Proposed section 19B is similar to s. 190D(2) of the NTA. Under the State scheme, all decisions in relation to registration are reviewable (for example, a decision to register some rights but not others). The test relating to association with the land by a parent of a member of the claimant group is applied directly at the registration stage in the State provisions rather than at the review stage as in the Commonwealth provisions.

*Clause 12: Amendment of s. 21 and relocation of ss. 21 and 22*

The amendment to section 21 is consequential on the inclusion of definitions of claimant and non-claimant applications. The provisions are relocated to alter the structure of the Part. Matters not relating to native title declarations (Division 3) are shifted to Division 4, Miscellaneous.

*Clause 13: Amendment of s. 23—Hearing and determination of application for native title declaration*

The amendment to subsection (2) allows a council to be heard on the hearing of an application for a native title declaration. Other amendments reflect s. 225(b) to (e) of the NTA. They require native title rights, and the relationship between the native title and other interests in the land, to be specifically defined.

*Clause 14: Insertion of heading*

A new Division 4 heading is inserted to better structure Part 4.

*Clause 15: Amendment of s. 27—Protection of native title from encumbrance and execution*

This is a consequential amendment relating to the restructuring of Part 4.

*Clause 16: Amendment of s. 30—Service where existence of native title, or identity of native title holders, uncertain*

These amendments introduce two different requirements for service on all who hold or may hold native title in land depending on whether the notice to be served is a right to negotiate notice (as defined) or not. If it is, the notice requirements derive from section 29 of the NTA (those that apply in relation to future acts giving rise to a ‘right to negotiate’). If it is not, more limited notification requirements apply similar to those set out in provisions giving native title holders procedural rights, such as 24MD of the NTA.

*Clause 17: Insertion of s. 39A—Content of orders for compensation to Aboriginal group*

Proposed section 39A corresponds to section 94 of the NTA.

*Clause 18: Transitional provision—Previous registration or application for registration of claim to native title*

These provisions require reconsideration of any claims lodged before commencement of the Part in accordance with the new registration test.

The Hon. CAROLYN PICKLES secured the adjournment of the debate.